Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 76-1729

TERM, 1977

JOHN J. BOCK,

v.

OTTO CONSTRUCTION CORPORATION,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional, Statutory and Rules Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	11
Appendix A	
Notice of Judgment Order	A1
Judgment Order of U. S. Court of Appeals for Third Circuit	A2
Appendix B	
Complaint No. 74-385 U. S. District Court for Western District of Pennsylvania, John J. Bock v. Otto Construction Corporation	B1
Appendix C	
Petition of Otto Construction Corporation to Open Default Judgment	C1
Answer to Defendant's Petition to Open Default Judgment and New Matter	C5
Appendix D	
Letter of District Court giving Notice of preliminary pretrial conference	D1

Page

Appendix E
Stipulated Transcript of Pretrial Conference on June 7, 1976 before Hon. Hubert I. Teitelbaum, J. E1

Appendix F
June 7, 1976 Order of District Court F1

Appendix G
Transcript of Proceedings before Hon. Hubert I. Teitelbaum on September 14, 1976 ..... G1

CITATIONS.

Armstrong v. Manzo, 380 U.S. 545 (1965) 10
Boddie v. Connecticut, 401 U.S. 371 (1971) 8, 10
Fuentes v. Shevin, 407 U.S. 67 (1972) 10
Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970) ... 9
Hutton v. Fisher, 359 F.2d 913 (3rd Cir. 1966) 10
Mannke v. Benjamin Moore & Co., 375 F.2d 281 (3rd Cir. 1967) 10
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 10
Phoenix Mutual Life Ins. Co. v. Reich, 75 F. Supp. 886 (D.C. Pa. 1948) 10
Residential Reroofing Union Local 30-B Etc. v. Mezicco, 55 F.R.D. 516 (E.D. Pa. 1972) 10
Season-All Industries, Inc. v. Turkiye Sise Ve Cam Fabrik A.S., 425 F.2d 34 (3d Cir. 1970) 7, 8
Smith v. Kincaid, 249 F.2d 243 (6th Cir. 1957) 9
Tozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3rd Cir. 1951) 9, 10
Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575 (1945) 10
Wagg v. Hall, 42 F.R.D. 589 (D.C. Pa. 1967) 10

IN THE

Supreme Court of the United States

..... Term, 1977

No. .....

JOHN J. BOCK,

v.

OTTO CONSTRUCTION CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, OTTO CONSTRUCTION CORPORATION, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above-entitled case.

Opinions Below

There was no formal opinion of the District Court. The transcript of that Court, including the judge's statement denying The Petition to Open the Default Judgment, is reproduced in Appendix E to this Petition.

There was no opinion of the Court of Appeals. There was only a judgment order affirming the district court's judgment. It is reproduced in Appendix A to this Petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was dated on March 8, 1977 and entered on the same date (Appendix A). This order affirmed the judgment of The District Court of The United States for the Western District of Pennsylvania denying on June 7, 1976 Petitioner's Petition to Open Default Judgment (Appendix F, *infra*, p. F-1). The jurisdiction of the Court is invoked under 28 U. S. Code § 1254(1).

Question Presented

Was petitioner denied due process when the District Court under its own written notice of preliminary pretrial conference to discuss the Petition to Open Default Judgment proceeded at said conference to deny said Petition without affording petitioner the opportunity at a hearing or in another manner to present evidence and briefs/arguments in support of its Petition?

Constitutional, Statutory and Rules Provisions Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

Rule 55(c) of the Federal Rules of Civil Procedure for the United States District Courts provides as follows:

> "SETTING ASIDE DEFAULT. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60(b) of the Federal Rules of Civil Procedure for the United States District Courts provides as follows:

> "MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Statement of the Case

This action was for negligence and was originally filed in The United States District Court for the Western District of Pennsylvania based on diversity of citizenship.

On January 20, 1976, representatives of the Petitioner, Otto Construction Corporation (hereinafter referred to as "Otto"), first received actual notice of the lawsuit and of a default judgment rendered against it in the amount of One Million Dollars after constructive service of the summons on the Secretary of the Commonwealth. Immediately thereafter I. Bernard Halpern of New York, New York, former corporate counsel for Otto, and David H. Trushel, of Pittsburgh, Pennsylvania, counsel for the Hartford Insurance Group, insurer of Otto, began long distance negotiations relating to the representation of Otto in this lawsuit. These negotiations culminated in a Reservation of Rights Agreement between Otto and Hartford which was signed on April 23, 1976. Mr. Trushel thereafter, expeditiously filed an appearance and a Petition to Open Default Judgment with the District Court (Appendix C, *infra,* page C-1 *et seq.*).

On May 29, 1976, Mr. Trushel received notice from the district court that "a preliminary pretrial conference" would be held on Monday, June 7, 1976 "for the purpose of discussing Petition to Open Default Judgment filed by defendant." (Appendix D, *infra*, page D-1). Corporate counsel for Otto, Mr. Halpern, on the advice of Mr. Trushel, did not appear at the conference because the conference was to be only "preliminary" and "pretrial" in nature. Counsel relying on plain meaning of the notice was not prepared to present evidence or argument in support of Otto's Petition to Open Default Judgment and Mr. Trushel did not then argue or intend to argue the merits of the Petition. The fact that there was not a hearing is amply evidenced by Judge Teitelbaum's

comments of September 14, 1976, during the course of a hearing on certain discovery aspects of this case. The dialogue progressed as follows:

> "The Court: . . . Now I had indicated that I would consider a request for a hearing on the motion to open judgment, but I can't do that while an appeal is pending.
>
> Mr. Trushel: Well, Your Honor, if I can respond to that and tell the Court why we withdrew [the notice of appeal] at the time, there was an indication that the Court might grant a rehearing."
>
> The Court: Not a rehearing. There never was a hearing."

(Appendix G, *infra,* page G4).

At this preliminary pretrial conference covering only 5½ pages of transcript on June 7, 1976, Judge Teitelbaum without the taking of any evidence, either by way of affidavit or sworn testimony, denied Otto's Petition to Open the Default Judgment. A reading of the transcript from that proceeding reveals that Judge Teitelbaum did not deny Otto's Petition to Open Default Judgment because of any deficiency in the Petition or any delay in filing the Petition from the time of first actual notice. Rather Judge Teitelbaum stated at this conference:

> ". . . the motion to open the default judgment is denied on the basis that there has been a considerable period of time since the accident occurred, some four years. There will be another period of time before the case has been tried. There is no valid reason presented to open the judgment . . .
>
> Mr. Trushel: I recognize the Court's ruling but I think the obvious answer to that is at least as far as the record shows Otto never knew of the lawsuit.

> The Court: It is their duty to comply with Pennsylvania law, if they want to do business here. Further, counsel [for plaintiff] tells me of Mr. Halpern's behavior. To say the least it is not to entitle that company to any equitable relief."

(Appendix E, *infra*, page E4).

Thus, this default judgment was allowed to stand because of the lapse of time since the accident occurred, which lapse of time can in no way be attributed to Otto. The Complaint was not filed until April 24, 1974, one day before the expiration of the two year statute of limitations would have forever barred the action. Statutory service was not effected until August 28, 1974. From the latter date, until January 20, 1976, the day of actual notice, plaintiff's counsel was, according to his own statements, "going all over the world trying to locate Otto Construction Company" (Appendix E, *infra*, page E3).

But more importantly, Judge Teitelbaum stated that he felt that Otto was not entitled to have the judgment opened because it did not have clean hands and was not therefore entitled to any equitable relief (Appendix E, *infra*, page E5). This reason was based solely upon plaintiff's counsel's unsupported assertions at the conference which Otto never had an opportunity to refute. The Court relying on these statements never addressed Otto's Petition to Open Default Judgment but summarily dismissed it and the appeal to the Third Circuit Court of Appeals followed.

At the September 14 hearing referred to above, Judge Teitelbaum stated that he would grant Otto a hearing on the Petition to Open Default Judgment if Otto would withdraw its appeal to the Third Circuit. Otto felt that it could not withdraw that appeal, without consent of plaintiff's counsel (which consent plaintiff's counsel refused to give) since to do

so might prejudice Otto's right to appeal from a further Order of Judge Teitelbaum, who after a hearing adhered to his original order, confirming his original Order. That is, an appeal from the second order confirming the first might be stricken as untimely.

It seems obvious from reading the transcript of the September 14 hearing, and we believe that it is not unfair to state, that Judge Teitelbaum felt that the Petition to Open Default Judgment was not fairly and fully adjudicated and that Otto was entitled to a hearing on its Petition. The court of its own accord transmitted the transcript of the September 14th hearing to the Court of Appeals.

Reasons for Granting the Writ

1. The Court of Appeals in sustaining the lower court's decision sanctioned the taking of property without due process of law. The notice under which this was effectuated called only for a preliminary pretrial conference. Petitioner and its counsel were justified in assuming it was for the purpose only of setting the guidelines for a hearing on the merits. It was plainly insufficient upon which to proceed to grant a final determination upon statements of plaintiff's counsel only and without affording petitioner the opportunity to present its evidence to show why the default and answer occurred and that it had a meritorious defense.

2. In doing so, the Court of Appeals violates its own standards which it set forth in the case of *Season-All Industries, Inc. v. Turkiye Sise Ve Cam Fabrik A.S.*, 425 F 2d 34 (3d Cir. 1970), where the Court stated:

> "Moreover, we believe that it is undesirable in general for a district court to enter summary judgment

> after receiving briefs and without holding a hearing unless it makes clear in its order that all affidavits must be filed with the briefs."

(425 F.2d at 39).

Although this court was addressing a Motion for Summary Judgment, this same principle is applicable to a Petition to set aside a default judgment pursuant to Rule 55 (c) of the Federal Rules of Civil Procedure. Moreso, in this case, where the petitioner was not even afforded an opportunity to submit any evidence or brief in support of its Petition.

3. Plaintiff has contended that Otto's Petition to Open Default Judgment inadequately stated any grounds for relief. But, in the Petition, as any other pleading, it was not required that all supporting facts or details be set forth at length. A general statement of the ultimate facts and grounds for relief were sufficient. It is important to note that the district court's decision was not based on any inadequacy relative to the Petition to Open.

4. The position taken by the Court of Appeals and the District Court in this case manifests a flagrant repudiation of the standards which this Court has enunciated in *Boddie vs. Connecticut,* 401 U. S. 371 (1971), and related cases, concerning the principle where the Petitioner is not afforded an opportunity to present evidence or argument in support of a Petition allowed under the Federal Rules of Civil Procedure, then procedural due process is violated. The question of whether the default judgment should be opened can only be addressed after a full hearing by the Court. Until Petitioner is afforded an opportunity to present its case in support of the Petition to Open Default Judgment, it is premature for the plaintiff to assert that the Petitioner has failed to show a valid basis upon which the relief requested can be granted. Since petitioner was never afforded an opportunity to present a

valid basis to open the default judgment, the plaintiff cannot assert at this time that the petitioner failed to present a valid basis in support of its Petition.

5. May it also be noted that the Court of Appeals in its disposition of the appeal failed to consider a "Petition for Leave to File Separately a Brief Apart From that Filed by the Carrier" on the grounds that there was a conflict of interest between them, denied all arguments and failed to give consideration to the lower court's expressed willingness to grant the hearing (by which it in effect admitted error) and then rendered its judgment without opinion. This was a disposition of a judgment in the amount of one million dollars as summarily as that of the lower court.

6. Petitioner is entitled to an opportunity of showing why it did not answer the Complaint, why it received no notice of constructive process upon the Secretary of the Commonwealth and that it was not liable for negligence. This opportunity has been denied to it by both courts. Pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure, a party against whom a default judgment has been entered has a right to challenge the judgment and have it vacated, if, in the sound discretion of the Court, valid cause is shown. *Tozer v. Charles A. Krause Milling Co.,* 189 F.2d 242 (3rd Cir. 1951); *Gomes v. Williams,* 420 F.2d 1364 (10th Cir. 1970). A defaulting party is not entitled to relief as a matter of right, and the defaulting party carries the burden to present a justification supporting his motion to vacate the judgment. *Gomes v. Williams, supra; Smith v. Kincaid,* 249 F.2d 243 (6th Cir. 1957). But because default judgments are generally viewed with disfavor and the Courts favor trials on the merits with the full participation by all parties, a defaulting party showing reasons for the default that might be characterized as "excusable", pursuant to Rule 60(b), is entitled to relief from

the judgment. *Hutton v. Fisher,* 359 F.2d 913 (3rd Cir. 1966); *Mannke v. Benjamin Moore & Co.,* 375 F.2d 281 (3rd Cir. 1967); *Tozer v. Charles A. Krause Milling Co., supra; Residential Reroofing Union Local 30-B Etc. v. Mezicco,* 55 F.R.D. 516 (E.D. Pa. 1972). To be entitled to this relief, though, the defaulting party must show good excuse for the default through affidavits or other evidence. *Wagg v. Hall,* 42 F.R.D. 589 (D.C. Pa. 1967); *Phoenix Mutual Life Ins. Co. v. Reich,* 75 F.Supp. 886 (D.C. Pa. 1948).

The Supreme Court has continued to stress that a fundamental requisite of due process of law is the opportunity to raise all relevant issues and to be heard thereon. See *Universal Oil Products Co. v. Root Refining Co.,* 328 U.S. 575 (1945); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Armstrong v. Manzo,* 380 U.S. 545 (1965); *Fuentes v. Shevin,* 407 U.S. 67 (1972). The Court in *Boddie v. Connecticut,* 401 U.S. 371 (1971), discussed the right of a state to enter a default judgment against a defendant who, after adequate notice, failed to make a timely appearance. While conceding that default judgments do not violate due process requirements, the Court stated that due process does demand "an individual be given an opportunity for a hearing before he is deprived of any significant property interest." 401 U.S. at 380.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. WAYMAN,
WAYMAN, IRVIN & McAULEY,
1624 Frick Building,
Pittsburgh, Pennsylvania 15219,

I. BERNARD HALPERN,
74 Trinity Place,
New York, New York 10006,

Counsel for Petitioner,
Otto Construction Corporation.

APPENDIX A

Notice of Judgment Order

Office of the Clerk
UNITED STATES COURT OF APPEALS
For the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia 19106

Thomas F. Quinn
Clerk

Telephone
215-597-2995

March 8, 1977

D. H. Trushel, Esquire
Wayman, Irvin, Trushel
and McAuley
1624 Frick Building
Pittsburgh, Pennsylvania 15219

Re: John J. Bock vs. Otto Construction Corp.;
Otto Construction Co., Appellant
No. 76-1937

Dear Mr. Trushel:

Enclosed herewith is conformed copy of judgment-order entered by the Court today in the above-entitled case.

Very truly yours,

THOMAS F. QUINN,
T. F. Quinn, *Clerk.*

sdw
Enclosure

Appendix A—Notice of Judgment Order

Judgment Order of U. S. Court of Appeals for Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1937.

JOHN J. BOCK,

v.

OTTO CONSTRUCTION CORPORATION,
Otto Construction Corporation,
Appellant.

On appeal from the United States District Court
for the Western District of Pennsylvania
C. A. No. 74-385.

Submitted Under Third Circuit Rule 12(6) February 23, 1977.

Before: Biggs, Adams and Hunter, *Circuit Judges.*

After consideration of all of the contentions of the appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

Attest:

THOMAS F. QUINN,
Clerk.

By the Court,

(Illegible),
Circuit Judge.

Dated: Mar 8, 1977.

Appendix B—Complaint No. 74-385 U.S. District Court for Western District of Pennsylvania, John J. Bock v. Otto Construction Corporation.

APPENDIX B

Complaint No. 74-385 U. S. District Court for Western District of Pennsylvania, John J. Bock v. Otto Construction Corporation

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

JOHN J. BLOCK,
Plaintiff,

vs.

OTTO CONSTRUCTION CORPORATION,
Defendant.

Civil Action No. 74-385.

Jurisdiction will be based upon diversity of citizenship and amount in controversy.

1. Plaintiff is a citizen of the State of Pennsylvania.

2. Defendant, Otto Construction Corporation, is a citizen in the State of New York.

3. On or about April 25, 1972, the defendant corporation had been retained by the Jones & Laughlin Steel Corporation

for the purpose of building a Phenolate Distillate Processing Plant at the Hazelwood works.

4. On April 25, 1972, plaintiff became severely burned over large portions of his body when he fell into a trench carrying a phenolate distillate and other chemicals. Plaintiff's fall happened when he was walking over a large metal plate which was being used as a bridge plate. The bridge plate had been previously moved and jarred from its original position by employees of the defendant corporation, causing the plate to tip and causing plaintiff to fall into the chemicals.

5. The injuries and damages hereinafter set forth were caused solely by and were the direct and proximate result of the negligence of the defendant through its servants, agents and employees in the following respects:

a. In failing to warn the plaintiff of the dangerous and hazardous condition;

b. In failing to make the premises safe;

c. In dislodging the plate from a position of security so that the same became hazardous and dangerous;

d. In otherwise failing to use due care and caution under the circumstances.

6. Solely as the result of the negligence of the defendant as aforesaid, plaintiff sustained the following injuries:

a. First, Second and Third degree burns over large portions of plaintiff's body;

b. amputation of his leg.

7. As a result of the injuries as aforesaid, plaintiff has sustained the following damages:

a. He has suffered and will suffer great pain, suffering, inconvenience, embarrassment and mental anguish;

b. He has been and will be required to expend large sums of money for surgical and medical attention, hospitalization, medical supplies, surgical appliances, medicine and attendant services;

c. He has been and will be deprived of his earnings;

d. His earning capacity has been reduced and permanently impaired;

e. He has been disfigured;

f. His general health, strength and vitality have been impaired.

WHEREFORE, Plaintiff demands judgment from the defendant of an amount in excess of TEN THOUSAND ($10,000.00) DOLLARS, exclusive of interest and costs.

Respectfully submitted,

JAMES A. ASHTON,
Attorney for Plaintiff.

Appendix B—Complaint No. 74-385 U.S. District Court for Western District of Pennsylvania, John J. Bock v. Otto Construction Corporation.

AFFIDAVIT.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, personally appeared John J. Bock who being duly sworn according to law, deposes and says that the facts contained in the foregoing Complaint are true and correct to the best of his knowledge, information and belief.

JOHN J. BOCK.

Sworn to and subscribed before me this 23rd day of April, 1974.

MADELINE M. HART,
Notary Public,
Pittsburgh, Allegheny County, Pa.
My Commission Expires February 2, 1977.

Appendix C—Petition of Otto Construction Corporation to Open Default Judgment.

APPENDIX C

Petition of Otto Construction Corporation to Open Default Judgment

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

JOHN J. BOCK,
Plaintiff,

vs.

OTTO CONSTRUCTION CORPORATION,
Defendant.

Civil Action No. 74-385.

AND NOW COMES the defendant, Otto Construction Corporation, by its Attorneys, Wayman, Irvin, Trushel & McAuley, and files this Petition to Open Default Judgment averring the following:

1. The above captioned lawsuit arose out of an alleged accident on or about April 25, 1972 at the Jones & Laughlin Steel Corporation's Hazelwood Plant, Hazelwood, Pennsylvania.

2. This lawsuit was filed by Complaint at No. 74-385, Civil Action, in the United States District Court for the West-

ern District of Pennsylvania on April 24, 1974, alleging that the said accident and injuries occurred as a result of the negligence of the defendant.

3. Various attempts at service on the defendant were made but were unsuccessful. Constructive service was secured by serving the Secretary of the Commonwealth of Pennsylvania by certified mail on August 28, 1974.

4. First actual notice to defendant of the pending lawsuit occurred on January 20, 1976.

5. In the interim, and since the aforementioned Complaint was not answered, nor an appearance entered, a Default Judgment was taken against the Defendant on November 18, 1974.

6. On April 11, 1975 a hearing was held before the Honorable Hubert I. Teitelbaum for the purpose of assessing damages against the defendant.

7. On August 19, 1975, Judge Teitelbaum assessed damages against the Defendant in the amount of One Million ($1,000,000.00) Dollars.

8. Upon notice by defendant to its insurance carrier, Hartford Insurance Group, a Reservation of Rights Agreement was negotiated and entered into between the Defendant and Hartford on April 23, 1976.

9. An appearance was entered on behalf of the Defendant on May 11, 1976.

10. The Defendant, Otto Construction Corporation, avers that it has a just, full and complete defense against plaintiff's claim.

WHEREFORE, defendant, Otto Construction Corporation, requests this Honorable Court to open the Default Judgment filed against it at the above number and term.

WAYMAN, IRVIN,
TRUSHEL & McAULEY,

By .....,
D. H. Trushel,
Attorney for Defendant.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

AFFIDAVIT.

Before me, the undersigned authority, personally appeared D. H. Trushel, Esquire, of the law firm of Wayman, Irvin, Trushel & McAuley, Attorneys for Defendant, who, being duly sworn according to law, deposes and says that the averments of fact set forth in the foregoing Petition to Open Default are true and correct to the best of his knowledge, information and belief.

D. H. TRUSHEL.

Sworn to and subscribed before me this 24th day of May, 1976.

(Illegible),
Notary Public.
(Illegible).

In the

UNITED STATES DISTRICT COURT

For the Western District of Pennsylvania

JOHN J. BOCK,

Plaintiff,

vs.

OTTO CONSTRUCTION CORPORATION,

Defendant.

Civil Action No. 74-385

ORDER OF COURT

AND NOW, to-wit, this .... day of ....., 1976, the Default Judgment heretofore entered in the above matter is hereby Ordered opened.

BY THE COURT:

.....

Answer to Defendant's Petition to Open Default Judgment and New Matter

In the

UNITED STATES DISTRICT COURT

For the Western District of Pennsylvania

JOHN J. BOCK,

Plaintiff,

vs.

OTTO CONSTRUCTION COMPANY,

Defendant.

Civil Action No. 74-385

AND NOW COMES the plaintiff, JOHN J. BOCK, by his attorney, John P. Joyce and files this Answer to Defendant's Petition to Open Default Judgment averring the following:

1. Paragraphs numbered 1, 2, 3, 5, 6, 7 and 9 as stated in Defendant's Petition are admitted insofar as they reflect accurate historical information already part of the record in this case.

2. Paragraph number 4 of Defendant's Petition is beyond the knowledge and information sufficient for the plaintiff to form a belief as to the truth of the averment and it is therefore denied.

3. Paragraph number 8 of Defendant's Petition is beyond the knowledge and information sufficient for the plaintiff to form a belief as to the truth of the averment and it is therefore denied.

4. Paragraph number 10 of Defendant's Petition is denied in that the defendant does not have a just, full and complete defense to plaintiff's claim.

NEW MATTER

5. Defendant's pleading is insufficient in that it fails to properly aver facts upon which the requested relief may be granted, but rather simply asserts that it has a defense to plaintiff's claim.

6. Defendant's Petition is untimely in that is is filed eighteen months after plaintiff obtained a default judgment, almost nine months after the default judgment and damages award was entered, and over four months after it admitted having knowledge of the judgment.

7. As a direct result of the delays referred to in paragraph number 6, above, plaintiff avers that defendant is guilty of laches and has therefore waived its right to seek the extraordinary relief sought by it.

8. Defendant is guilty of "unclean hands" in that it continues to conceal its whereabouts, including the present, to the plaintiff by statements made through its counsel as follows: "Otto Construction Company has no current address since it has no business".

9. Defendant has not been vigilant to its legal responsibilities to the Commonwealth of Pennsylvania in general, and to the

plaintiff in particular, in its actions as a foreign business corporation from a time beginning before plaintiff's accident up to and including the present.

10. Defendant has violated the laws of the Commonwealth of Pennsylvania and continues these violations to the present with respect to Foreign Business Corporations, Article X, sections 1006, 1007, and 1013 and should therefore be estopped from seeking equitable relief as a matter of public policy.

11. Defendant has not only inexcusably neglected its responsibilities to the plaintiff and others, but it has further intentionally and deliberately concealed its whereabouts, and continues to conceal its whereabouts, in order to delay plaintiff's efforts to execute upon the judgment entered by this Honorable Court.

12. As a direct result of defendant's actions of concealment, the plaintiff, John J. Bock, is now severely prejudiced in his ability to present his claim due to a period of time in excess of four years passing from the date of the incident until the presentment of defendant's petition. Generally, the prejudice averred herein relates to all of the reasons supporting the public policy of statutes of limitation and laches, and specifically, the loss of witnesses, the diminishment of memories of persons having knowledge of the events, the loss of records, and the loss of other tangible things.

WHEREFORE, Plaintiff, JOHN J. BOCK, prays that this Honorable Court will deny Defendant's Petition to Open the Default Judgment entered against it.

.....

JOHN P. JOYCE,
Attorney for Plaintiff.

Appendix D—Letter of District Court Giving Notice of Preliminary Pretrial Conference.

APPENDIX D

Letter of District Court Giving Notice of Preliminary Pretrial Conference

UNITED STATES DISTRICT COURT

Western District of Pennsylvania

Pittsburgh, Pennsylvania 15219

Chambers of
Hubert I. Teitelbaum
Judge

May 28 1976

May 28, 1976

John P. Joyce, Esq.
810 Porter Bldg.
Pittsburgh, Pa. 15219

David Trushel, Esq.
Wayman, Irvin, Trushel & McAuley
1624 Frick Bldg.
Pittsburgh, Pa. 15219

RE: John J. Bock v Otto Construction Corp.
Civil Action 74-385

Gentlemen:

A preliminary pretrial conference in the above-captioned civil action, which has been assigned to this member of the Court, will be held on MONDAY, JUNE 7, 1976 at 9:30 A.M. in Room 1036, United States Post Office and Courthouse for the purpose of discussing Petition to Open Default Judgment filed by defendant.

Appendix D—Letter of District Court Giving Notice of Preliminary Pretrial Conference.

Trial counsel for all parties, unless actually engaged in trial in some other court, should be present to advise the Court as to all relevant matters. If trial counsel are actually otherwise engaged, other counsel fully informed as to status of the case and authorized to make binding agreements on behalf of trial counsel and the client shall appear.

Very truly yours,

HUBERT I. TEITELBAUM

rrg

Appendix E—Stipulated Transcript of Pretrial Conference on June 7, 1976 before Hon. Hubert I. Teitelbaum, J.

APPENDIX E

Stipulated Transcript of Pretrial Conference on June 7, 1976 before Hon. Hubert I. Teitelbaum, *J.*

In the

DISTRICT COURT OF THE UNITED STATES

For the Western District of Pennsylvania

JOHN J. BOCK,

Plaintiff,

v.

OTTO CONSTRUCTION COMPANY,

Defendant.

74-385 Civil Action

Hon. Hubert I. Teitelbaum, *J.*
Pittsburgh, Pennsylvania
9:30 o'clock a. m.
Monday,
June 7, 1976

Appendix E—Stipulated Transcript of Pretrial Conference on June 7, 1976 before Hon. Hubert I. Teitelbaum, J.

For the Plaintiff: John Patrick Joyce, Esq.

For the Defendant: Wayman, Irvin, Trushel & McAuley, By: David H. Trushel, Esq.

The Court: Mr. Trushel, you have a motion to open the judgment but your pleading doesn't tell where your client is located. They don't have an address. You are in under a reservation of rights?

Mr. Trushel: Yes, your Honor.

The Court: So your client isn't liable.

Mr. Trushel: Hartford, yes.

The Court: Is not liable.

Mr. Trushel: Well, we are handling it under a reservation of rights.

The Court: If I open this judgment and the judgment for the plaintiff is your company going to pay it?

Mr. Trushel: If the Court elects to open the judgment then I assume we would have a trial on the merits.

The Court: Are you going to pay it? Or are you going to stand on a reservation of rights?

Mr. Trushel: If we lose we will pay it up to the limit of the policy which is $100,000.

The Court: Are you willing to reveal where Otto Construction Company is located?

Mr. Trushel: Your Honor, I passed on the information that has been given to me by their counsel, Mr. I. Bernard Halpern of New York City.

The Court: We want to know where they are located so that we can proceed. Now, assuming that the insurance carrier will stand behind the judgment now you are going to be bound by this up to a hundred thousand dollars, no reservation of rights.

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Mr. Trushel: The reservation of rights, your Honor, was solely with regard to the fact that there has been a default judgment and once the judgment is opened we afford them coverage under the terms of the policy.

The Court: Are you willing to have it opened under this basis?

Mr. Joyce: No, I don't mean to be obstinate or appear to be that way.

The Court: It is your ballgame.

Mr. Joyce: There is more to it than I have put in the answer.

Mr. Joyce: For one point only Mr. Trushel has indicated that Halpern from New York City is personal counsel. I assume you mean for Otto Construction Company, well, I don't know what you mean.

The Court: He doesn't represent Hartford.

Mr. Trushel: That is what I mean.

The Court: House counsel.

Mr. Joyce: Well, this gentleman called me on or about January 20, Mr. Halpern. I have been going all over the world trying to locate Otto Construction Company. Finally, I located them, their parent, in Germany. That parent then forwarded a letter to Mr. Halpern, who then called me. He asked me what this was all about, why did I want to know anything about Otto Construction Company. I told him exactly what it was. He then refused to give me his address. I said, "I will send you a copy of the pleadings." "I would like the address." He said, "I am not going to bother with it." I said, "How about giving your address?" My point is, Judge, if we would get into this I think the Court would see that this isn't a simple mistake by Otto or a change of address without telling somebody. I think, as much as I don't like to accuse them of it, it seems to me a deliberate effort by them to conceal. This is a

big outfit, this isn't some siding company that is here today and gone tomorrow and yet they act like an aluminum siding company. The parent company is still making a lot of money so I don't have a whole lot of faith at this point in Otto Construction Company.

The Court: You can get a hundred thousand dollars maybe this way. You would prefer to stand on your present judgment?

Mr. Joyce: Yes, I would.

The Court: All right, the motion to open the default judgment is denied on the basis that there has been a considerable period of time since the accident occurred, some four years. There will be another period of time before the case has been tried. There is no valid reason presented to open the judgment. Under our law when we do business under the law of the State of Pennsylvania when you do business here you authorize the Secretary of State to accept service. If he served it on whom he should have served it and I see no valid reason why Otto did not notify your client before this so that you could make a timely defense.

Mr. Trushel: I recognize the Court's ruling but I think the obvious answer to that is at least as far as the record shows Otto never knew of the lawsuit.

The Court: It is their duty to comply with Pennsylvania law, if they want to do business here. Further, counsel tells me of Mr. Halpern's behavior. To say the least it does not entitle that company to any equitable relief. If he were a Pennsylvania lawyer he would have a lot of trouble with me.

Mr. Trushel: I would only say this, in other words, Mr. Halpern isn't here to defend himself.

The Court: He wouldn't give him his address or Otto's address.

Mr. Trushel: I did notify Mr. Halpern of the hearing this morning and he called me and asked me if I thought he should be here.

The Court: If he shows up here he better not show up without his present address. That is the thing that appears to me to be dead wrong is that he is refusing to give the present address saying he doesn't want to bother Otto with a case like this.

Mr. Joyce: That is the exact words.

The Court: It seems to me that that is highly improper and I gave you your choice because you are giving up the possibility of getting a hundred thousand dollars in favor of something else. Some place he is dealing with somebody.

Mr. Trushel: He is dealing with a Mr. Hans Otto, I am not sure of "Hans", there is a Mr. Otto.

The Court: That is your statement.

Mr. Joyce: The reservation of rights agreement.

The Court: Well, I am going to sign the order attached to the answer denying the petition because I can see that you could be hurt by this long delay in trying to put in your case. The only way that he ever got a response is when he tracked down somebody. I just don't think Otto has clean hands here. I distinguish between Otto and Hartford, I am not making any such reference whatsoever to Hartford.

Mr. Joyce: I don't want in any way to disparage Mr. Trushel.

The Court: All right, you know which order, it is on the answer to the petition.

Okay, thank you, men.

CERTIFIED: a true and accurate transcript.

C. R. SHUFF,
Official Court Reporter.

APPENDIX F

June 7, 1976 Order of District Court

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

JOHN J. BOCK,

Plaintiff,

vs.

OTTO CONSTRUCTION COMPANY,

Defendant.

Civil Action No. 74-385

AND NOW, to-wit this 7th day of June, 1976, the Defendant's Petition to Open the Default Judgment is hereby denied.

By the Court;

TEITELBAUM, *J.*

APPENDIX G

Transcript of Proceedings Before Hon. Hubert I. Teitelbaum on September 14, 1976

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

JOHN J. BOCK,

Plaintiff,

vs.

OTTO CONSTRUCTION CORPORATION,

Defendant.

Civil Action No. 74-385

Conference in the above-entitled action, beginning at 10:20 a.m. on September 14, 1976, United States District Court, Pittsburgh, Pennsylvania, before Honorable Hubert I. Teitelbaum, District Judge.

Appearances:

On behalf of the Plaintiff: John P. Joyce, Esquire, Bart M. Beier, Esquire.

On behalf of the Defendant: David H. Trushel, Esquire, I. Bernard Halpern, Esquire.

Marilyn G. Brown
Official Reporter

(The following proceedings were held in the conference room beginning at 10:20 a.m.)

The Court: This is a conference which has been requested on the case of John J. Bock vs. Otto Construction Company. A default judgment was entered in this case. No request was made by anybody for a hearing at our conference. The only request for a hearing was in a letter which I received from an attorney in New York.

I guess that's you.

Mr. Trushel: This is Mr. Halpern, Your Honor.

The Court: Mr. Halpern, I received a letter from an attorney in New York, you, asking for a hearing. That's the first request for a hearing I ever had.

I refused the matter on conference because of having no request for a hearing at that time, and no reason was presented that I could see why I should open up the judgment.

The matter is now on appeal. There was an appeal to the Court of Appeals by you.

Mr. Trushel: Correct.

The Court: The appeal was by Otto Construction. Mr. Bock, through his counsel, objected to it. There was a motion then to withdraw the appeal.

Mr. Trushel: Correct.

The Court: Because I indicated that if the appeal were withdrawn, I would consider the request for a hearing.

You filed a motion to dismiss the appeal without prejudice. Then Bock objected to it. Then you withdrew the motion to dismiss the appeal.

So now it is on appeal before the Court of Appeals.

Mr. Trushel: Correct.

The Court: I am not going to do anything while it is on appeal before the Court of Appeals. I mean, until they act on

it, the file is all in Philadelphia and the matter is before that Court, and I have no case before me at this time.

Mr. Trushel: Well, that's fine with me, Your Honor. I don't know whether the Court's remarks require any response from me.

The Court: I don't think there is any response required.

Mr. Joyce: Just—Excuse me.

The Court: Why would we want to have any discovery when we don't have a case?

Mr. Joyce: Well, Your Honor, of course, we don't know what the result will be in the Court of Appeals.

The Court: No.

Mr. Joyce: But the plaintiff is now in a position where we do not have an address for the defendant.

There has been no supersedeas bond applied for by the defendant to put security into the case.

The counsel for the defense, Mr. Trushel, has indicated in his objections to those interrogatories that should the appeal be unsuccessful for his client, that he no longer intends to represent the client, which puts the plaintiff in the position of having a judgment, not having an address for the defendant, and not any longer having an attorney to—

The Court: What is the defendant's address?

Mr. Halpern: I have no hesitancy about giving it.

The Court: Give him the address.

Mr. Halpern: The address is care of—The company, as I told you, has been out of existence; that is, it has not been active. It has been completely liquidated—

The Court: All I want you to do is give him the address.

Mr. Halpern: —in 1974.

The address is Care of 212 Chapel Road, Manhasset, Long Island, and the name of the person is Hans Otto.

The Court: Now you have an address.

Mr. Joyce: Yes. Your Honor, if I might, I did do some research on the question of the discovery and I did spend a good deal of time preparing a brief. If it wouldn't be inappropriate, I would like to give that brief to you, for whatever it may be—

The Court: I have your motion.

Mr. Joyce: Yes.

The Court: I am not going to deny your motions. I am just going to withhold action on it—

Mr. Joyce: May I give this to you?

The Court: Surely,—until the Court of Appeals acts on the appeal.

Now I had indicated that I would consider a request for a hearing on the motion to open judgment, but I can't do that while an appeal is pending.

Mr. Trushel: Well, Your Honor, if I can respond to that and tell the Court why we withdrew, at the time, there was an indication that the Court might grant a rehearing.

The Court: Not a rehearing. There never was a hearing.

Mr. Trushel: A hearing. I'm sorry. A hearing.

The Court: And the only reason there wasn't a hearing was, nobody ever asked for one.

Mr. Trushel: Well, as far as that's concerned, Your Honor, I received a notice indicating that there was a preliminary hearing. I assumed, maybe rightly or wrongly, we were going to come down and discuss what our procedure would be in the future.

The Court: Sure, but you didn't tell me you had any witnesses you wanted to present.

Mr. Trushel: Well, of course, after we were here a very short time, the Court ruled, and that was it, on what I

assumed would be a preliminary conference, what the order indicated, to discuss the case.

But at any rate, when the Court—

The Court: Whatever you considered, the status right now is that you have not yet requested a hearing.

Mr. Trushel: I would like to have a hearing. That's what I want. That's the reason we took the appeal.

The reason the motion to withdraw the appeal was withdrawn was because, number one, I had some hesitancy about whether, should the Court after hearing enter an order reinstating its original order, whether we had a right to appeal at that time.

The Court: So that there be no mistake, if the Court of Appeals sustains my refusal to open judgment, that's it.

Mr. Trushel: I understand that, Your Honor, but—

The Court: Now your crack at it is—You had two of them, one with me by withdrawing your appeal, and the second, the other is with the Court of Appeals, asking them to do what I haven't been asked to do.

Mr. Trushel: Well, as I say, the reason we withdrew that was, number one, I had some question as to whether we could then appeal, whether or not there might be a technical argument that the 30 days had elapsed; and secondly, in view of Mr. Joyce's objection—If Mr. Joyce will consent to a hearing on this, that's exactly what we want, but I don't want to run the risk of not being able to appeal to the Third Circuit and—

The Court: You are a lawyer, and a good lawyer, and you have to reach that decision.

If the appeal were not there, I would grant you a hearing. If the appeal were withdrawn, I would grant you a hearing.

I am not going to tell you, though, that I would open the judgment, because that would be perfectly irregular.

Mr. Trushel: I understand. If Mr. Joyce has no objection, I will withdraw the appeal.

The Court: Well, if he wants to object or not, if you want to withdraw your appeal, you can do it over objection.

Mr. Trushel: As I understand it, under the rules, if it is not with his consent, we have to have a hearing.

The Court: I have no opinion on that subject, whether the Court of Appeals would let you do it. But that's up to you fellows. But I am going to hold your motion for discovery. If the Court of Appeals affirms the action taken, I will then consider your motions. If they send it back for a hearing, I will hold a hearing.

If the appeal is—If they permit you—Well, there is no motion pending to withdraw the appeal.

Mr. Trushel: Correct.

Mr. Halpern: Well, that has been disposed of.

The Court: So that's disposed of.

So the only thing we are going to do now is wait and see what the Court of Appeals is going to do.

Mr. Trushel: Anything else?

Mr. Halpern: No. The only thing, if I may say something,—I am a New York attorney.

The Court: Well, yes.

Mr. Halpern: I discussed the matter with Mr. Trushel, and I asked him that if we withdrew the appeal and did have a hearing, what would our position then be with respect to our right to appeal from any decision that was made on the hearing; and we both felt that there might be some difficulty because, if Your Honor's order was an order that disposed of the matter, and I don't know whether another order could be rendered on a hearing from which we would have the right to appeal.

Now there might be some stipulation that Mr. Joyce will not object to any appeal from an order that Your Honor may render on a hearing.

Now if he does that, why, I go along with Mr. Trushel.

The Court: I don't know whether he will or won't, but in my position, I can't give a legal opinion on that, one way or the other. That's something you have to decide for yourselves.

Mr. Halpern: Well, I think that at least in our Circuit, there is that difficulty.

There is an order here, and if the appeal is set aside, can you appeal from an order confirming the original order?

So if we have a stipulation with Mr. Joyce to the effect that our right to appeal from any order that Your Honor may render on a hearing, if we get that stipulation, then I go along with Mr. Trushel.

The Court: Well, that's all between you fellows. I play no role in that whatsoever.

Mr. Halpern: How do you feel about it, Mr.—

Mr. Trushel: Well, that seems to me to be the logical approach, but I don't know that Mr. Joyce is going to agree to that.

Mr. Halpern: I think the best that we can expect is a—

The Court: I think in all fairness to me, however, when you do argue this before the Court of Appeals, I think you should tell the Court of Appeals that I indicated that I would grant a hearing if the appeal were withdrawn. I think—

Mr. Trushel: I certainly would be happy to—

The Court: I think that ought to be brought to the Court's attention.

I don't think you should be there in the position that I have said you can't have a hearing, because I haven't said that. I have said that I wasn't requested until I got a letter from a

person who was not an attorney of record, and then I got in touch with the attorney of record, and I have indicated I would grant such a hearing if the appeal were withdrawn.

So I don't know—

Mr. Trushel: I would be—As a matter of fact, if Mr. Joyce has no objection, I would be glad to file this transcript with the Court as a supplemental appendix, so that that's a matter of record.

Mr. Joyce: Well, the only problem with that, Your Honor, is that I am, of course,—

The Court: Well, I am going to send this transcript to the Court of Appeals, one way or the other.

Mr. Trushel: You are?

The Court: Oh, sure. I want my position perfectly clear in this matter.

Mr. Trushel: Well, for the record, I agree that what the Court has said, that is what transpired.

Mr. Joyce: All I would say to that, Your Honor, is, I am in the final days, of course, of writing my brief. Mr. Trushel was amending his appendix at my request. So if the transcript of today's hearing were to be included, I would have to seek an enlargement of time, I suppose. I only have a few days to get my brief in.

The Court: Well, we will send the transcript through the Clerk to Philadelphia.

Mr. Joyce: Might I make this request, Your Honor, that since the transcript of today's hearing will be before the Court of Appeals, that through the kindness of the court reporter we be able to purchase copies of it?

The Court: Oh, she is always happy to do that.

Mr. Joyce: Your Honor, I didn't introduce you to Bart Beier. You may recall, Mr. Beier is my co-counsel in this case.

The Court: Yes. I have seen Mr. Beier before.

All right. Now as to what the status of it is, I am going to reserve judgment on the motion for discovery pending action by the Court of Appeals as to—

Mr. Trushel: There is another matter, Your Honor, which I think Mr. Joyce and I are in agreement on.

I filed a motion to reform the transcript. When we received the transcript of the prior hearing, it was very garbled, including interchanges of Mr. Joyce's name and my name.

Mr. Joyce apparently got in touch with the court reporter, and there were some corrections made, which consisted of changing the names.

Mr. Joyce: Only.

Mr. Trushel: Changing the names only.

There are some other errors in the transcript. I went through it and, as best I could, made some handwritten changes; and I don't think you have any objection to reforming the transcript to that extent, do you?

Mr. Joyce: I don't, Your Honor, and I indicated that to you, to Your Honor in a letter, that I had no objections.

I am not entirely happy with that transcript either, but at this late date, for me to insert words or to—I certainly don't question the words that Mr. Trushel wishes to include in the reformation of the transcript, so that I have no objection to that.

The Court: Now where are you asking that this be done? Here, or the Court of Appeals?

Mr. Trushel: Well, this is the problem. I suppose I would have to include in a supplemental appendix a reformed transcript.

The Court: Yes. I mean I have no file here. It is all in Philadelphia.

Mr. Joyce: The changes are—to my mind at least, Your Honor,—minor ones. To Mr. Trushel, they may be important.

The names have been changed, wherein Mr. Trushel was credited with saying things that I have said and I am credited with saying things that he said; and I think there are just a few words that Mr. Trushel wished to—

Mr. Trushel: I don't know how critical they are, but I think that the record should—

The Court: Why don't you agree to it then by a stipulation and file it with the Court of Appeals?

Mr. Trushel: I think we have—

The Court: All right. I think that since it is all down there now, that you should file your stipulation I guess with the Clerk here—Is that right, Mr. Grainer?—and then the Clerk will send it to the Court of Appeals.

Or should it be filed directly with the Clerk of the Court of Appeals?

Mr. Grainer: It probably should go down there.

Mr. Rogal: It goes directly.

The Court: Why don't you just file that with the Clerk,—

Mr. Trushel: All right.

The Court: —in Philadelphia, for the Court of Appeals in Philadelphia?

Mr. Halpern: Your Honor, may I state one more thing before we close?

The Court: Surely. You can state anything.

Mr. Halpern: Your Honor stated that nobody requested a hearing.

Well, I can give the answer to that. Nobody requested a hearing, because the notice that was sent was a conference, preliminary trial conference in order to discuss the petition.

Now I called Mr. Trushel and I said to him, "Do you think I ought to be there?"

The Court: Well, Mr. Halpern, you are not being hurt by this, because I have said that I will give you a hearing if the case is—but I can't do it while it is on appeal.

Mr. Halpern: I see.

The Court: Therefore, you are not being hurt a bit.

But since it is on appeal, the Court of Appeals may not agree with me you ought to have a hearing. That's up to them to decide.

Mr. Halpern: No. The only thing I wanted to point out was that from the notice, it was to be a conference, was to be a preliminary pretrial hearing to discuss the petition.

Now no lawyer would gather from that that there was going to be a final determination at that conference.

The Court: My thought in calling that conference was to see if I could get an agreement on this matter between counsel. When I couldn't get an agreement between counsel, and since I wasn't told of anything that would justify reopening it,—

Mr. Halpern: No, because we weren't prepared, because we considered that notice to call a preliminary pre-trial conference to discuss it.

The Court: Well, maybe that's what you considered. That wasn't my—

Mr. Halpern: It was a final order.

The Court: That wasn't my thought when I called it.

But I don't know what you are saying all this for, because you are not being hurt a bit, since I have said to you that if you want a conference and if the appeal is withdrawn, I will give you one. I don't know what your complaint is.

Mr. Halpern: I just want to go on record as stating why nobody requested a hearing.

The Court: Well, for whatever reason there wasn't one requested, you are not being hurt, because I have told you, as I have told Mr. Trushel before, that I am not going to do anything while it is on appeal, because I can't. But if it were withdrawn, I would grant you a hearing.

Now what the Court of Appeals will decide, I don't know. They may decide that after all that period of time, you don't deserve a hearing. That's for them to decide, not for me. Okay?

Mr. Trushel: Very well.

Mr. Joyce: Thank you, Your Honor.

Mr. Halpern: Thank you.

(The conference was concluded at 10:40 a.m.)

REPORTER'S CERTIFICATE.

I hereby certify that the foregoing is a true and complete transcript of the conference held in the aforementioned action on September 14, 1976, before Honorable Hubert I. Teitelbaum, District Judge.

MARILYN G. BROWN,
Official Reporter.